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In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 313

GEORGE JOSEPH ORITO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on April 20, 1970. A petition for rehearing was denied on May 26, 1970. The petition for a writ of certiorari was filed on June 24, 1970. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether handwriting exemplars of petitioner were improperly obtained or impermissibly used by the government at trial.

2. Whether petitioner should be heard to contend for the first time in this Court that he was entitled to an adversary proceeding prior to the issuance of a search warrant for the seizure of concededly pornographic material located at an airport terminal, or that his obscenity conviction under 18 U.S.C. 1462 was constitutionally invalid under *Stanley* v. *Georgia*, 394 U.S. 557.

STATEMENT

After a non-jury trial in the United States District Court for the Central District of California, petitioner was convicted of having violated 18 U.S.C. 1462 [1] by his knowing receipt in Los Angeles of nine cartons of obscene material from a common carrier (Trans-World Airlines) which had transported them there from New York (IR. 2).[2] On March 9, 1969, he was sentenced to three years' imprisonment. The court of appeals affirmed on April 20, 1970 (Pet. App. A).[3]

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[1] The statutory provision is set forth in the Petition at pp. 6-7.

[2] "R." preceded by the volume number refers to the four volume court of appeals record on file with the Clerk of this Court. Volume 1 contains the record of the various motions, rulings, and other allied papers. The trial transcript is contained in volumes 2-4, consecutively paginated.

[3] This April 20 opinion was substituted for a withdrawn opinion of March 2, 1970 (see Pet. App. B).

1. At trial, petitioner stipulated that material (the subject matter of the instant indictment) had been shipped on May 30, 1968, by Trans-World Airlines from New York to Los Angeles; that the material contained "hard core" pornographic material under the standards of this Court; that petitioner had claimed the shipment on May 30, and thereafter had transported it in a rented station wagon (2R. 8-19); and that the address of the New York shipper was that of his sister, while the address of the California consignee was fictitious (2R. 19). Petitioner further stipulated that, at about the same time, he had sought to claim another shipment of material, also admittedly pornographic, which had been shipped from Baltimore to Los Angeles by American Airlines, but that when he was advised at the freight office that there would be a delay in locating the shipment, he left and never returned [4] (2R. 20, 23, 26-27). The Baltimore freight agent testified that petitioner had shipped the material from Baltimore under an assumed name. It was further stipulated that the Baltimore address of the shipper was non-existent (2R. 27, 57, 143-144; 3R. 168). In September 1968, some months after his arrest, petitioner called an FBI agent and asked that an investigation into his activities be discontinued, as he was "no longer" engaged in the sale of pornography (3R. 248-250, 271).

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[4] The vehicle which petitioner had rented on May 30 to transport this material was found abandoned in the airport parking lot (2R. 104-106, 133-136). It was found to contain obscene photographs from the New York shipment.

Petitioner's sole defense at trial was that he did not know that the material in the New York shipment which he had claimed was obscene (see Pet. 8; Pet. App A2).

2. The packages involved in the Baltimore-Los Angeles shipment were seized from the airlines terminal pursuant to a search warrant (2R. 156; 3R. 260-261; Pet. App. C 1-3). The affidavit submitted in support of the warrant was prepared by an FBI agent and alleged probable cause as follows: that on May 24, 1968, an American Airlines employee had advised the agent that during the course of "regular business" a shipment of nine cartons from Baltimore had been received, and one had broken open; that in examining the damage done to the carton, it was determined that the carton "contained photographs which depict males and females participating in various acts of sexual relations"; that the shipping papers showed that the shipper was one "Joseph Klein" and the carton was addressed to one "M. Markham," Azusa, California, with the notation "Will Call" (Pet. App. C 1-3). Seven of these packages were seized (the other two could not be located). A composite sample of the pictures contained in this shipment and certain photographs contained in the New York-Los Angeles shipment were admitted into evidence over a defense objection that they were irrelevant (Govt. Ex. 35; 2R. 24, 156; 3R. 265; 4R 329).[5]

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[5] Without any factual predicate, petitioner made a pretrial motion to suppress on grounds of illegal search and seizure (1R. 9, 17, 19). The district court denied the motions without opinion (1R. 53). It was assumed below (although the orig-

Two handprinted address labels were also removed from the seized packages (Govt. Exs. 27, 28; 3R. 195-196, 221). These were compared with three known exemplars of petitioner's printing (Govt. Exs. 25, 39, 40). Of these three known exemplars, one was a bank loan application (Govt. Ex. 25); the other two were papers that petitioner had printed while a prisoner at a local jail some years earlier (2R. 46; 3R. 168-172). An expert witness testified for the government that the person who wrote the bank loan application and the jail papers wrote the shipping addresses on the two packages shipped from Baltimore (3R. 196-203).

Additional handwriting exemplars of petitioner were obtained under court order, and over the protest of defense counsel, during the course of the trial (2R. 204, 207-208, 211; Govt. Exs. 41-44).[6] Defense

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inal motion papers are not clear on this matter) that petitioner was challenging only the seizure of an address book from his home. Since this item was not admitted into evidence or shown to taint any evidence actually admitted, the court of appeals summarily rejected as baseless the search and seizure claim (see Pet. App. B 2-3).

[6] The trial exemplars were obtained in the following manner: On October 30, 1968, the second day of trial, the prosecution asked the court to order petitioner to submit handwriting exemplars (1R. 59; 2R. 40). On November 8, the next trial date, petitioner, who was out on bond, did not appear in court. The trial judge ordered his bond forfeited and issued a bench warrant for his arrest. At this time, the court granted the government's motion to require petitioner to furnish exemplars. The court stated that petitioner was to be granted further bond, but petitioner was required to furnish the exemplars within two days of his release. Counsel was told that failure to comply would result in a contempt action (2R. 72, 80-82, 92). The exemplars were thereupon provided.

counsel introduced these exemplars in an effort to impeach the testimony of an employee at a jail in which petitioner had been an inmate in 1965. That witness, in addition to authenticating the jail records that petitioner had printed, also testified on direct examina- as a government witness that petitioner had a distinctive method of writing certain letters and that he therefore knew the records authenticated were those handprinted by petitioner (3R. 168-172). On cross-examination, defense counsel sought to use "plain sheets of paper with some handwriting on them." The court directed that these be marked (3R. 182). Defense counsel then laid these (Govt. Exs. 41-44) before the witness and asked if the witness thought that these were in petitioner's handwriting. The witness replied that he could form no opinion as to them (3R. 184, 186). Subsequently, the government's handwriting expert testified that he did not use these court dictated exemplars for comparison purposes; he stated that he found them to be disguised or distorted, as shown by the apparent shakiness and slowness of their execution (3R. 212-213, 220, 239-240). He was not able to form an opinion whether the person who made them had written the addresses on labels in issue. (3R. 211).

ARGUMENT

1. Petitioner argues that the exemplars ordered by the court were obtained impermissibly, as a condition for petitioner's release on bail (Pet. 10-12). The record shows that no such condition was imposed. Petitioner had already been released on bail when the ex-

emplars were required (n. 6, p. 5, *supra*). It was within the court's discretion to require that petitioner provide exemplars or otherwise face a contempt citation. See *Gilbert* v. *California*, 388 U.S. 263, 266-267; *Bradford* v. *United States*, 413 F. 2d 467, 471-472 (C.A. 5). *Izzi* v. *United States*, C.A. 2, No. 34133, decided April 20, 1970, certiorari denied, June 29, 1970, No. 1585, O.T., 1969; cf. *Davis* v. *Mississippi*, 394 U.S. 721, 727-728. Moreover, it was defense counsel, not the prosecutor, who introduced the challenged exemplars into the case, when he sought to use them to impeach a government witness. Finally, as the court of appeals pointed out (Pet. App. A 2-3), the government's use of other exemplars for comparison purposes and the overwhelming evidence that petitioner was both the shipper and receiver of hard core obscenity rendered any error in the use of these exemplars harmless beyond a reasonable doubt.

2. As petitioner himself concedes, Pet. 14 n. 1, 15 n. 2, the remaining questions raised by the petition were not developed below. This is not a case where there are important considerations calling upon this Court to decide the questions nonetheless. Compare *Adickes* v. *Kress & Co.*, No. 79, O.T., 1969, decided June 1, 1970, sl. op. p. 2. n. 2. Petitioner urges only that the questions are of "importance" and "significance"; if that is so, they will doubtless be presented in other cases in circumstances more fully developed for this Court's consideration.

a. Petitioner's suggestion that an adversary hearing was required before issuance of the search warrant which resulted in the seizure of the Baltimore shipment overlooks important differences between a

seizure in the nature of forfeiture proceedings directed against an established publishing house or book store, *e.g.*, *A Quantity of Books* v. *Kansas*, 378 U.S. 205, and the detention of shipments made in interstate commerce between possibly fictitious addressees and addressors. In the former case, the defendant and his whereabouts are known; copies of allegedly offensive materials can be obtained for judicial inspection by purchase in advance of initiating the proceedings; and a speedy hearing on issuance of the warrant may be assured—with suitable protection, if that is thought required, against the defendant's disposal of the challenged materials in advance of the hearing.

Like an automobile on the highways (*Carroll* v. *United States*, 267 U.S. 132; *Cooper* v. *California*, 386 U.S. 58; *Chambers* v. *Maroney*, No. 830, O.T., 1969, decided June 22, 1970), allegedly obscene matter in transit through channels of interstate commerce presents an emergency situation in which the same procedures cannot be required. Here, for example, any effort to serve the apparent sender of the Baltimore shipment with notice of a hearing would have been unavailing, for the name and address petitioner gave were fictitious; the same was true of the ostensible addressee. It was proper for the government to move first, in circumstances which gave rise to undoubted probable cause for the search. Cf. *United States* v. *Van Leeuwen*, 397 U.S. 249. If it is the seizure rather than the search which is objected to, petitioner could have secured a prompt determination of the obscenity *vel non* of the materials, and their return if not obscene, by a motion for their return;

but he never even pressed his claim for the materials with the carrier.[7]

b. Petitioner appears to assert that this Court's decision in *Stanley* v. *Georgia*, 394 U.S. 557, forbids his prosecution for receipt of obscenity in bulk from a common carrier in interstate commerce. Since the issue was not raised below, the question whether petitioner intended the eighteen cartons of materials he shipped for purely personal use was never considered; but the very size of the shipments and other evidence strongly suggests that he was in the business of commercial distribution of obscene material.

The question whether *Stanley* forbids prosecution for commercial conduct as well as private possession of obscenity is presently pending before this Court in a number of contexts. *E.g.*, *Byrne* v. *Karalexis*, No. 83, this Term (restricted access to motion picture); *United States* v. *Thirty-Seven (37) Photographs*, No. 133 this Term (on Jurisdictional Statement; constistitutionality of the customs obscenity statute, 19 U.S.C. 1305(a), as applied to commercial dealer); *United States* v. *12 200-Ft. Reels of Super 8 mm. Film, et al.*, No. 364, this Term (same; constitutionality of customs obscenity statute as applied to importation for allegedly personal use). The United States has noted its appeal and intends presently to file a

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[7] We note that the only materials seized were the photographs and other matter said to be obscene. Thus, there is no issue here regarding the scope of the search. Cf. *Perez* v. *Ledesma*, jurisdiction postponed, June 29, 1970 (No. 60, this Term); see also *United States* v. *Wild*, 422 F. 2d 34 (C.A. 2), pending on petition for a writ of certiorari, No. 104, this Term.

Jurisdictional Statement from a holding of the United States District Court for the Central District of California (*United States* v. *Reidel*, No. 5845-HP-CD, decided June 8, 1970) that *Stanley* bars a prosecution for the consensual mailing of obscene matter by a commercial mailer to a mail order, adult patron under 18 U.S.C. 1461.

This Court made clear in *Stanley*, however, that its holding there did not impair the government's "broad power to regulate obscenity" in a commercial context. 394 U.S. at 568. See also, Brief for the United States as *Amicus Curiae*, *Byrne* v. *Karalexis*, *supra*; *Gable* v. *Jenkins*, 397 U.S. 592, affirming *per curiam* a holding that the Georgia statute prohibiting *distribution* of obscene material was neither unconstitutionally vague nor overbroad. Particularly in the absence of argument or presentation below, which might have developed limiting or illuminating factual circumstances, we believe there is no reason in this case to defer disposition pending the outcome of these other cases.

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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